

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of:

Amendment of Section 73.202(b)
Table of Allotments, FM Broadcast
Stations (Rosendale, New York)

)
)
)
)
)

MM Docket No. 93-17
RM-8170

To: Chief, Allocations Branch

DOCKET FILE COPY ORIGINAL

PETITION FOR RECONSIDERATION

State University of New York ("SUNY"), by its counsel, petitions for reconsideration of the Report and Order in MM Docket No. 93-17, RM-8170, 60 Fed. Reg. 54954 (October 27, 1995) ("R&O") insofar as the Allocations Branch determined not to modify the license of SUNY's station WFNP, Rosendale, New York, to specify operation on the newly allotted FM Channel 273A. As grounds for its refusal to modify SUNY's license, the Branch relies on an unwarranted, after-the-fact interpretation of Section 1.420(g) that is inconsistent with precedent and deprives SUNY and the public of the advantages envisioned by the Commission in adopting the rule. The R&O should be reconsidered and SUNY's license for WFNP modified to specify operation on Channel 273A.

By separate pleading filed today, SUNY also requests the Branch to stay the opening of the window filing period for Channel 273A at Rosendale, thus preserving the prospects of a correction of course by the Branch and saving applicants for the channel and the

No. of Copies rec'd
List ABCDE

049

Commission the effort and expense to apply for and process applications that may, depending on the outcome of this proceeding, be incapable of consideration.

Background

SUNY's noncommercial educational station WFNP at Rosendale currently shares FM Channel 204 with noncommercial educational Station WRHV, Poughkeepsie, New York, licensed to WMHT Educational Telecommunications. The share time arrangement arose out of a settlement of a comparative hearing proceeding between the parties. Although SUNY and WRHV have cooperated in sharing the frequency, they have experienced the inevitable consequences of such an arrangement--listener confusion over varying formats and the inability of either party to maximize its service to the public. Consequently, SUNY investigated options to permit both parties to operate full-time stations in their respective communities. Due to congestion in the reserved FM band, the only possible option was for SUNY to move its operation into the nonreserved band.

SUNY's Petition for Rulemaking sought the allocation of Channels 273A and 255A at Rosendale and, pursuant to the unambiguous procedures of Section 1.420(g) of the rules, the modification of the WFNP license to specify operation on Channel 273A, which of the two frequencies best fit SUNY's needs.

The Branch proposed the allotment of Channel 273A at Rosendale and the requested modification of SUNY's license. Notice of Proposed Rule Making, DA93-99 (released February 17, 1993). The Branch noted that WFNP is a noncommercial educational station and that SUNY had not requested that Channel 273A be reserved for noncommercial use. It therefore requested SUNY to clarify whether it wanted the channel reserved and instructed

SUNY as to the showing such a reservation would require. Significantly, the Branch did not state or imply in any way that, if SUNY chose to have the allocation nonreserved, the Branch believed itself incapable of modifying the WFNP license as SUNY requested and the Branch proposed.

In its Comments, SUNY clarified that it requested Channel 273A to be allotted as a nonreserved channel. However, SUNY also stated that it would operate the station noncommercially, which, of course, is completely permissible.

Several other parties filed counterproposals for the use of Channel 273A. However, in the R&O, the Branch correctly determined that none of these efforts were acceptable for consideration in this proceeding. Thus, the stage was set for the routine granting of SUNY's allocation/modification proposal, as there was (1) no other timely filed expression of interest and (2) even if there had been such an expression of interest, there was an additional frequency (Channel 255A) that was also available. See Section 1.420(g)(1) and (2).

Inexplicably, the R&O allotted Channel 273A as requested, but determined that the WFNP license could not be modified based entirely on the Branch's view, previously unshared with SUNY and the public, that a noncommercial station may not take advantage of Section 1.420(g) unless the new allotment is reserved for noncommercial use.

Bases for Reconsideration

The Branch's failure to modify the WFNP license to specify operation on Channel 273A at Rosendale is an error that must be corrected. It is directly at odds with the clear language of Section 1.420(g), which has no reserved/unreserved "gloss." It is fundamentally at odds with the public interest goals that formed the basis of the Commission's adoption of the

rule. It is squarely inconsistent with precedent. It will likely deprive SUNY of the benefits that motivated it to initiate this proceeding and, at best, result in substantial delay in effectuating a new service on the frequency. It is also manifestly unfair to SUNY, which believes that the Branch reversed itself on this issue to SUNY's detriment. Any one of these factors is a sufficient legal basis for reconsideration. Taken together, they form a compelling case.

1. The Rule Does Not Support the Branch's Interpretation. The language of Section 1.420(g) has to govern the Branch's decision. That language is clear and unambiguous. It permits "an FM station" to initiate the process and makes no distinction whatever between noncommercial and commercial stations, or between reserved and nonreserved allotments. When it adopted the rule in 1984, the Commission can be presumed to have understood these distinctions and, had it desired to do so, it could have made them part of the rule. It did not do so. The Branch has no authority in 1995 for the first time to add a new "gloss" to the rule. It has to follow the rule as written.

2. SUNY's Proposal Clearly Furthers the Goals of the Commission in Adopting the Rule. In the Report and Order in MM Docket No. 83-1148, FCC 84-358 (released July 26, 1984), the Commission adopted Section 1.420(g) in order to "continue its policy of encouraging broadcast licensees to upgrade their facilities." *Id.* at ¶4. The FCC believed that "FM and television station licensees should be encouraged to upgrade their facilities in order to improve service to their audiences," *id.* at ¶6, and that the rule it adopted comported with the mandate of Ashbacker and reflected sound administrative policy. SUNY's proposal would result

in upgraded facilities and improvement in service to its audience. Indeed, this case furthers the Commission's goals more than most--it would result in the upgrade and improvement of service at two stations (WFNP and WRHV).

In the R&O, at ¶2, the Branch offers that, in the 1984 Report and Order, the Commission stated that "the procedure [of Section 1.420(g)] does not apply to stations seeking to switch from a noncommercial band channel to one within the commercial band, finding the issue to be outside the scope of the proceeding." With all due respect, the 1984 Report and Order "states" no such thing concerning the rule's applicability. Buried in ¶12 of that decision is an off-hand reference -- clearly dictum-- to an unarticulated "suggestion" of a now-defunct law firm concerning a switch from a reserved channel to a commercial channel, which "suggestion" was deemed outside the scope of the proceeding. There is no way at this time to know what that "suggestion" was, whether it applied only to a particular situation for which some special advantage was sought, or whether it urged some unusual twist that departed from what the Commission generally sought to accomplish. What is clear is that, despite that reference, the rule the Commission adopted did not limit its application to commercial stations moving from one nonreserved channel to another. To suggest so now, in view of the fact that the Branch has previously applied the rule to the contrary (see below), is sophistry.

3. The Branch's Position is Squarely at Odds with Precedent. In ¶3 of the R&O, the Branch concedes that the Commission, in the Sioux Falls case, did exactly what SUNY urges it to do here--it applied Section 1.420(g), a little more than a year after its adoption, to a noncommercial station seeking to move from a reserved channel to a nonreserved channel

without seeking a reservation for the new allotment. FM Broadcast Station in Sioux Falls, SD, 51 Fed. Reg. 4169 (February 3, 1986).

The Branch goes to great lengths to try to explain how that case differs from this one, suggesting that the Commission was trying to correct an “error” in earlier proceedings. SUNY respectfully urges that this explanation by the Commission merely went to the public interest benefits of the proposal. The Notice of Proposed Rulemaking and the Report and Order in that case did not state anywhere that, absent that earlier mistake, the allotment/modification could not have taken place. The Commission also did not state that it was waiving or bending the rule in any respect, or that the decision should not be relied on in the future by noncommercial stations seeking to invoke Section 1.420(g).

Indeed, what’s remarkable about Sioux Falls is that the Commission seemed entirely unbothered by the petitioner’s candid explanation that, while its present plans did not contemplate the provision of any service other than noncommercial educational programming, it wanted the option, should circumstances change, of being able to change to commercial service if by so doing “some advantage might accrue to the [petitioner].” Id. at ¶3. If the Commission intended its decision to be a narrowly-prescribed cure for a noncommercial station that had been mistakenly deprived of a useful reserved frequency, it would have been expected to limit the station’s service to noncommercial programming. Instead, the Commission simply allowed the station to take advantage of the rule. Given the public interest benefits of SUNY’s proposal, the same result holds.

4. The Branch's Action Will Deprive SUNY, WMHT and the Public of the Benefits of SUNY's Proposal. The effectuation of SUNY's proposal would result in upgraded service on two radio stations that now share a single frequency. Unfortunately, requiring SUNY to apply for Channel 273A in a window open to all now-interested applicants will substantially delay, if not deny, these benefits. Experience suggests that, now that the channel is allotted and available, numerous other parties--all of them commercial--will also apply. Even if SUNY eventually prevails in a hearing, that victory will be a long time coming and will be at great expense to SUNY, the other applicants and to the Commission. Moreover, given the likely comparative criteria that will eventually apply to the channel, SUNY's prospects as a noncommercial applicant will not be good. The result will be that, when all is said and done, after initiating the rulemaking and prosecuting its case, SUNY, WMHT and the public will be deprived of the advantages that justified the allotment in the first place.

5. The Branch's Action Here is Manifestly Unfair. Finally, this petition for reconsideration rests on simple notions of justice and fair play. In the NPRM, the Branch noted that SUNY had not sought to have Channel 273A reserved and went to great lengths to explain what SUNY would have to show if it wanted a reserved allotment. Despite all that, the Branch never explained that, absent a choice to have the allotment reserved, it interpreted Section 1.420(g) as precluding the very result SUNY sought. Perhaps this was an oversight -- a "mistake" on the part of the Branch (compare Sioux Falls). Or perhaps the Branch changed its position on the issue between the issuance of the NPRM and the R&O. Under either of these scenarios, the result is unfair and unjust, and should be corrected.

Conclusion

For all these reasons, the Branch should grant reconsideration of its decision in the R&O. It should rescind the filing window for Channel 273A at Rosendale and instead modify SUNY's license for WFNP to specify operation on the newly allotted channel.

Respectfully submitted,

STATE UNIVERSITY OF NEW YORK

By: Todd D. Gray
Todd D. Gray
Its Attorney

DOW, LOHNES & ALBERTSON
1255 Twenty-third Street, N.W.
Suite 500
Washington, D.C. 20037
202/857-2571

November 21, 1995

REPORT AND ORDER
(Proceeding Terminated)

Before the
Federal Communications Commission
Washington, D.C. 20554

Adopted: October 3, 1995;

Released: October 20, 1995

By the Chief, Allocations Branch:

MM Docket No. 93-17

In the Matter of

Amendment of Section 73.202(b), RM-8170
Table of Allotments,
FM Broadcast Stations.
(Rosendale, New York)

¹ Neither of the counterproposals is acceptable for consideration in this proceeding. Natole requests that Channel 255A be allotted to West Hurley, New York, as its first local aural service, instead of to Rosendale. Natole failed to serve a copy of its pleading on the petitioner, as required by 1.420(a) of the Commission's Rules. However, in light of our action herein, we will consider Natole's request as a new petition for rule making and issue a separate Notice of Proposed Rule Making.

RSB is the permittee of Station WQQQ, Channel 277A, Sharon, Connecticut and SHU is the licensee of noncommercial educational FM Station WSHU, Fairfield, Connecticut. They request that Station WQQQ's construction permit be modified to specify Channel 273A and that its community of license be changed from Sharon to Washington, New York. In addition, they request that Channel 277A remain allotted to Sharon but that it be reserved for noncommercial educational use. SHU states its intention to apply for Channel 277A at Sharon. This counterproposal is not acceptable for consideration since Section 1.420(i) only permits the modification of a station's authorization to specify a new community of license where the new allotment is mutually exclusive with the licensee's or permittee's present assignment. Here, RSB seeks modification to a non-adjacent channel and thus there is no mutual exclusivity. In its reply comments, RSB/SHU argues that its counterproposal should have been accepted since the proposed channel allotments comply with the Commission's spacing requirements. They contend that even if non-technical problems exist which ultimately would lead to the denial of the counterproposal, these problems are not a bar to the acceptance of the counterproposal. RSB also claims that the Commission should have accepted its counterproposal and sought comment on the allotment of Channel 273A to Sharon and the modification of Station WQQQ's construction permit accordingly. RSB acknowledges that the proposed allotment of Channel 273A to Sharon was not explicitly stated in the counterproposal but argues that it was implicit in its proposal. It now specifically states that it wants to be modified to Channel 273A even if the station must remain a Sharon facility.

We disagree with SHU/RSB. Counterproposals must be technically and procedurally correct when filed and may not be amended at a later date. See *Arlington, Texas, et al.*, 8 FCC Rcd 4281 (1993), *Hondo, Texas, et al.*, 7 FCC Rcd 7610 (1992), *Flora, Mississippi, et al.*, 7 FCC Rcd 5477 (1992). Contrary to SHU/RSB's apparent belief, the failure to state specifically their alternate proposal to allot Channel 273A to Sharon and modify Station WQQQ's construction permit accordingly renders the counterproposal both technically and procedurally defective.

1. At the request of the State University of New York ("petitioner"), licensee of noncommercial educational Station WFNP, Channel 204A, Rosendale, New York, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 947 (1993), proposing the allotment of Channel 273A to Rosendale and the modification of Station WFNP's license to specify the alternate Class A channel. Comments were filed by the petitioner and counterproposals were filed by Raymond A. Natole ("Natole") and jointly by Sacred Heart University, Inc. and Radio South Burlington ("SHU/RSB").¹ Reply comments were filed by the petitioner, WMHT Educational Telecommunications ("WMHT"), SHU/RSB² and Bambi Broadcasting, Inc. ("Bambi").³ ⁴ For the reason discussed below,

Further, we find that SHU/RSB has not shown any reason why the Commission should have, on its own motion, proposed the allotment of Channel 273A to Sharon and the modification of Station WQQQ's license accordingly. RSB, in its reply comments, states that the change of channel is necessary to allow it to operate with 6 kW of power. However, the counterproposal clearly states that Channel 277A, which is Station WQQQ's presently authorized channel, can be operated with 6 kW at the site of an existing tower and provide all of Sharon with the required 70 dBu city-grade service. If the sole purpose of the counterproposal were to provide Sharon with its first local noncommercial educational service, then it would have been necessary to submit a proposal requesting only the allotment of Channel 273A to Sharon and no mention of Channel 277A, at either Sharon or Washington, would have been necessary. Therefore, we do not agree that the allotment of Channel 273A to Sharon and the modification of Station WQQQ's construction permit to specify the alternate Class A channel to be either implicit in or a logical outgrowth of RSB/SHU's counterproposal. Further, even if we were to agree that the allotment of Channel 273A to Sharon were properly before the Commission, we note that RSB/SHU has failed to include a technical showing that the channel can be allotted in compliance with the Commission's minimum distance separation requirements or, at a minimum, to provide proposed coordinates for such an allotment. Therefore, the counterproposal fails to meet the requirement that a petitioner provide a technical showing demonstrating compliance with the Commission's rules. See *Provincetown, Massachusetts, et al.*, 8 FCC Rcd 19 (1993), *Big Spring, Texas, et al.*, 7 FCC Rcd 4834 (1992).

² SHU/RSB's reply comments relate to the acceptability and public interest benefits of its counterproposal. As stated in footnote 1, *supra*, the counterproposal is not acceptable for consideration and thus the potential public interest benefits need not be discussed.

³ Bambi's reply comments consist of an expression of interest in applying for Channel 273A, if allotted to Washington. This pleading is moot in light of the dismissal of SHU/RSB's counterproposal.

⁴ After the record closed the following unauthorized pleadings were received: "Motion for Leave to File Supplemental Reply Comments" and "Supplemental Reply Comments" filed by SHU/RSB; "Petition for Leave to File Natole's Comments on SUNY Response to SHU/RSB Supplemental Reply Comments" filed by Natole; "Response to SHU/RSB Supplemental Reply Comments" filed by SUNY; and "Motion for Leave to Respond to Natole's Comments on SUNY Response to SHU/RSB Sup-

we will not modify the noncommercial educational license of station WFNP to operate on Channel 273A as a commercial station. Instead, we will allot Channel 273A as a commercial channel and open a filing window

DISCUSSION

2. In reviewing our earlier *Notice*, we discovered that we had proposed to modify petitioner's license for Station WFNP to specify operation on Channel 273A as a commercial station.⁵ As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (Channels 201-220). Exceptions have been made in cases where channels in the noncommercial band are not available because of foreign allocations (Canadian or Mexican) or potential interference to TV Channel 6 operations. Here, there is no channel within the noncommercial band for use by Station WFNP because of the community's proximity to other existing domestic licensees, not because of the existence of either Canadian stations or TV-6 interference problems. Therefore, we find that, consistent with Commission precedent, we cannot modify Station WFNP's license from a noncommercial to a commercial channel without the commercial channel's reservation for such use. See, *Siloam Springs, Arkansas*, 2 FCC Rcd 7485 (1987), *aff'd* 4 FCC Rcd 4920 (1989), *Bulls Gap, Tennessee*, MM Docket 94-117, releases September 22, 1995 (DA 95-1981). Finally, even though there is an additional equivalent channel which could be allotted to Rosendale in the event other parties had expressed an interest in applying for Channel 273A, we do not believe that we can invoke the procedure set forth in Section 1.420(g). That rule permits the modification of a station's license to specify a non-adjacent higher class channel with the availability of additional equivalent or superior class channel for use by other interested parties. However, the Commission stated in the *Report and Order* adopting the rule, that the procedure does not apply to stations seeking to switch from a noncommercial band channel to one within the commercial band, finding the issue to be outside the scope of the proceeding.⁶

3. We recognize that the Commission, in *Sioux Falls, South Dakota*, modified the license of Station KCFS from noncommercial educational Channel 211A to commercial Channel 261A. However, that action corrected an error on the Commission's part when it had misinterpreted the desire of Stations KCFS to provide Sioux Falls with two noncommercial educational services on Channels 211A and 215A and instead deleted the station from Channel 211A. Further, the error was not caught until an application for a new station on Channel 211A had been filed and

granted cut-off protection. The *Notice* in that proceeding advised interested parties of our error and the fact that an additional commercial channel was available to accommodate any expression of interest in a commercial channel. Moreover, in the *Report and Order* granting the modification of Station KCFS from a noncommercial channel to a non-reserved commercial channel, we also noted that Sioux Falls received local noncommercial educational service from four stations and local commercial service from five stations, thus there was no concern that we would be removing the community's sole local noncommercial educational service. Here, Station WFNP provides the community's only local noncommercial educational service and the modification of its license to a non-reserved commercial could result in the loss of the community's sole noncommercial educational service.

4. However, based on petitioner's stated intent to apply for the unreserved channel 273A at Rosendale, we will allot the channel and specify an application filing window. We believe the public interest would be served by allotting Channel 273A to Rosendale, New York, since an interest has been expressed in providing the community with its first fulltime FM service.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 4, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Rosendale, New York	273A

6. Channel 273A can be allotted to Rosendale in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.7 kilometers (2.9 miles) southeast to avoid a short-spacing to Station WUUU, Channel 273B, Rome, New York.^{8, 9} Canadian concurrence in the allotment has been received since Rosendale is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

7. The window period for filing applications for Channel 273A at Rosendale, New York will, open on **December 4, 1995**, and close on **January 4, 1996**.

8. IT IS FURTHER ORDERED, That the counterproposals filed jointly by Sacred Heart University, Inc. and Radio South Burlington to modify the license of Station WQQQ, Sharon, Connecticut, from Channel 277A to

plemental Comments' and to SUNY Response to SHU/RSB Supplemental Reply Comments" filed by SHU/RSB. The Commission's Rules do not contemplate the filing of pleadings beyond the comment periods set forth in the *Notice*. Moreover, we find that the additional comments do not provide information of decisional significance and therefore will not be considered.

⁵ Petitioner filed comments reiterating its intention to apply for the channel, if allotted. In response to the *Notice*, petitioner also clarified that it does not want channel 273A reserved for noncommercial educational use even though it will continue to operate Station WFNP as a noncommercial station.

⁶ See *Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses*, 56 R.R. 2d

1253, 1257 (1984).

⁷ See *Notice of Proposed Rule Making*, 50 FR 5430, June 19, 1985, *Report and Order*, 51 FR 4169, February 3, 1986.

⁸ The coordinates for Channel 273A at Rosendale are North Latitude 41-49-14 and West Longitude 74-02-13.

⁹ Petitioner, in its reply comments, states that it intends to apply for a construction permit at its presently authorized transmitter site, not the reference coordinates set forth in the *Notice*. The petitioner is not required to submit an application specifying the reference coordinates set forth herein. However, we expect that the application will comply with the technical requirements set forth in the Commission's Rules

Channel 273A, reallocate Channel 273A from Sharon to Washington, New York, and reserve Channel 277A at Sharon for noncommercial educational use, ARE DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Petition for Reconsideration" was served this 21st day of November, 1995, by first class United States mail, postage prepaid, upon the following:

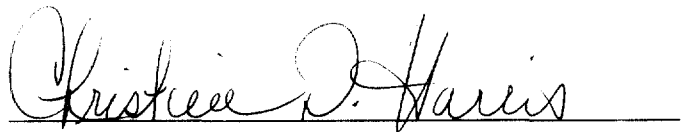
Mr. John A. Karousos*
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8322
Washington, D.C. 20554

Mark N. Lipp, Esquire
Mullin, Rhyne, Emmons & Topel, P.C.
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036-5383

Steven C. Schaffer, Esquire
Schwartz, Woods & Miller
1350 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036

Allan G. Moskowitz, Esquire
Kaye, Scholer, Fierman, Hays & Handler
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

Mr. Raymond A. Natole
P.O. Box 327
Shokan, New York 12481

A handwritten signature in cursive script, reading "Kristine D. Harris", is written over a horizontal line.

* Via Hand Delivery.